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No. 92-63

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1992

Frontier Pilots Litigation Steering, Committee, Inc.,

Petitioner,

v.

Continental Airlines, Inc., Continental Pilots Merger Committee, and People Express Pilot Merger Committee,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENT PEOPLE EXPRESS PILOT MERGER COMMITTEE IN OPPOSITION

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August 10, 1992

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals and the District Court properly upheld the finality provision of the JPA arbitration agreement, which led to the Nicolau Award, by limiting the Frontier Pilots to but one arbitration to merge the Frontier and Continental Pilots' Seniority Lists?

2. Whether the Court of Appeals properly held that the District Court acted within its discretion in rejecting the Frontier Pilots' contention that affirmance of the Ross Award was barred on account of the Arbitrator's brief, conspicuous, non-substantive conversation with Capt. Jim Mackenzie on July 12, 1991?

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OPINIONS BELOW

The Order of the District Court for the District of New Jersey Compelling Arbitration, entered August 7, 1989, is not published, but is reprinted in the Appendix to the Petition at pages 1a-15a.

The Opinion and Order of the District Court for the District of New Jersey entered November 26, 1991, affirming an arbitration award, is not published, but is reprinted in the Appendix to the Petition at pages 16a-57a.

The Judgment Order of the Court of Appeals affirming the District Court's decision, entered February 13, 1992, is not officially reported, but is reprinted in the Appendix to the Petition at pages 58a-60a.

The Order of the Court of Appeals denying rehearing and rehearing in banc, entered April 10, 1992, is also not reported officially, but is reprinted in the Appendix to the Petition at pages 61a-63a.

JURISDICTION

Following the Judgment Order of the Court of Appeals on February 13, 1992, Petitioners filed a motion for rehearing or rehearing in banc which was denied on April 10, 1992. The Petition was filed on

July 9, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The relevant statute is a section of the Railway Labor Act, 45 U.S.C. § 153(p), which establishes the grounds for vacating arbitration awards in the railroad and airline industries. That section provides in part:

> [T]he district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment . . . as may be appropriate to enforce or set aside the order . . . : Provided, however, That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

STATEMENT

I. THE CORPORATE MERGER AGREEMENT

During the summer of 1986, People Express, Inc. ("PEI") was an airline holding company; its two largest wholly-owned subsidiaries were People Express Airlines,

Inc. ("PEX") and Frontier Airlines, Inc. ("FAL"). App. 246-247. In August 1986 FAL ceased operating and filed for protection from its creditors under Chapter 11 of the Bankruptcy Code. App. 177.[1] On September 15, 1986, PEI entered into a Merger Agreement with Texas Air Corporation ("TAC"), another airline holding company, the largest of whose subsidiaries was Continental Airlines, Inc. ("CAL"). App. 17-77.

On September 19, 1986, as then required by the Federal Aviation Act, 49 U.S.C. §§ 1301, *et seq.*, TAC and PEI filed a joint application seeking approval from the U.S. Department of Transportation ("DOT") for their proposed merger. App. 78-92. In the joint application, the companies described two separate agreements relating to seniority integration which were a part of their transaction.

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[1] "App." references are to the Joint Appendix prepared and submitted to the Court below.

II. THE JPA AND THE NICOLAU AWARD

The first was the Frontier-Continental Job Preservation Agreement (the "JPA"). App. 99-131. The JPA contemplated CAL's acquisition of certain FAL assets and employees, but was contingent upon the execution of specified waivers and agreements by the FAL pilots and their collective bargaining representative, the Air Line Pilots Association, International ("ALPA"). App. 34, 39. These agreements included an arbitration for the consolidation of the FAL and CAL pilot seniority lists, but mandated the arbitrator to "take special notice of the non-operating status of Frontier Airlines immediately prior to the date of this Agreement and the limited employment prospects for Frontier employees resulting therefrom." App. 117-18.

The Frontier Pilots approved the JPA by unanimous vote at a union meeting on October 2, 1986, ALPA executed it on October 6, 1986, and the required percentage of FAL pilot waivers were sent to

CAL by October 15, 1986. App. 440, 445. TAC acquired FAL's assets during October and November, 1986.

On January 7, 1987, the FAL and CAL pilot representatives entered into a seniority integration procedures document which reaffirmed the JPA's basic precepts, including the fact that the arbitrator's decision was to be "final." App. 303-05. George Nicolau conducted an arbitration pursuant to these agreements, and he rendered his Opinion and Award on June 15, 1987. App. 171-222 ("the Nicolau Award"). He placed a block of 162 FAL senior captains in the CAL list beginning at number 1675. App. 214, 220.

The FAL pilots were displeased with the Nicolau Award because they felt that the JPA had restricted Arbitrator Nicolau to considering certain negative factors (such as limited employment prospects and promotional expectations) arising out of FAL's non-operating status immediately prior to its acquisition by CAL. The FAL pilots attacked the validity of the

Nicolau Award in the Colorado courts, but to no avail. App. 323, 487, 822.

III. THE LPA AND THE ROSS AWARD

In their joint application to the DOT, TAC and PEI also urged the DOT not to impose labor protective provisions ("LPPs") as a condition of its approval of the merger because TAC and PEI had already entered into a Labor Protection Agreement ("LPA") to facilitate a smooth labor transition. In support of their claim that the DOT need not impose other restrictions, TAC and PEI attached a copy of the LPA, which required that:

> Provision shall be made for fair and equitable seniority integration procedures, for affected employees in each craft or class, which shall include as a final step, if necessary in the absence of agreement, a final and binding decision by a neutral mediator who shall be a member of the National Academy of Arbitrators. App. 15-16.

DOT tentatively approved TAC-PEI's joint application for merger, and made specific reference to the companies' assurances concerning their provisions

for seniority integration. DOT Show Cause Order, Docket 44365, dated October 15, 1986, p. 2. DOT issued its Final Order approving the merger on October 24, 1986. App. 164-70. That order denied LPPs and left Texas Air and People Express free to pursue seniority integration in accordance with the LPA.

Following an affirmative vote of PEI shareholders on December 29, 1986, the transaction was consummated the next day. App. 615. When CAL unilaterally merged the People Express pilots into the CAL/FAL pilots' seniority list without the agreement or arbitration as prescribed in the LPA, the People Express Pilot Merger Committee ("the PEX Pilots") brought suit against CAL, seeking compliance with the LPA. App. 615.

The District Court compelled an arbitration to combine the PEX and CAL/FAL pilot seniority lists under the terms of the LPA on August 7, 1989. App. 473-81. Recognizing that the Arbitrator would pay

close attention to the Order Compelling Arbitration,[2] the District Court consciously refrained from focusing the Arbitrator's attention on any particular consideration and allowed the parties, during arbitration, to argue any factor they thought relevant to the seniority integration. App. 968-69, 471-72.

The District Court further determined that the former Frontier Pilots had a right to participate in the arbitration over the People Express pilots' integration into the combined Continental-Frontier seniority list. The Frontier Pilots admitted in the District Court in seeking to intervene that "the seniority rights of the Frontier pilots at Continental were already decided in a prior arbitration proceeding," and that "[w]e acknowledge the Nicolau Award, . . . and we recognize that it is final and binding absent it being set aside." App. 340, 366. They nonetheless argued for the right

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[2] "I think the point is well taken that the arbitrator is going to carefully read the submission that I give him. He's going to feel bound to follow what the submission is, as all arbitrators are." App. 472.

to intervene "in order to prevent any encroachment on the seniority rights . . . currently held by the Frontier pilots." App. 334. The Frontier pilots' need for separate representation from the other pilots on the combined Frontier-Continental seniority list arose out of the possible impact of Arbitrator Ross inserting hundreds of People Express pilots into the combined Frontier-Continental list constructed by Arbitrator Nicolau marginally senior to the Frontier pilots. App. 366. The solid block of positions on the Continental seniority list Arbitrator Nicolau had given to them and the recency of their addition to the list rendered the FAL pilots particularly vulnerable, as a group, to Arbitrator Ross's interposition of People Express pilots just ahead of them. App. 740, 791. However, the District Court cautioned that the FAL Pilots' participation in the PEX arbitration was only "to prevent a possible change in their existing seniority status," and did not amount to an additional opportunity for the FAL pilots to litigate their

previously-defined positions on the existing CAL/FAL seniority list, as constructed by Arbitrator Nicolau. App. 370, 376-77.

In accordance with the District Court's Order, the FAL pilots, the PEX pilots, the CAL pilots and CAL proceeded through seventy-two (72) days of arbitration hearings over the issue of how to integrate the PEX pilots into the CAL/FAL seniority list. App. 618. Jerome H. Ross decided the lengthy, hard-fought arbitration, which took nearly a year to complete and generated 16,725 pages of transcript, approximately 1,000 exhibits and more than 1,000 pages of post-hearing briefs. App. 744.

IV. THE PARTIES' POST-HEARING TECHNICAL SUPPORT COMMITTEE AND ARBITRATOR ROSS'S BRIEF, CONSPICUOUS, NON-SUBSTANTIVE CONVERSATION WITH CAPT. JIM MACKENZIE ON JULY 12, 1991

After the close of the evidentiary hearings before Arbitrator Ross, and after the submission of briefs and closing argument, all four parties consented to participate in meetings of a joint Technical Support

Committee. That committee, composed of pilots only, provided the Arbitrator computer and other technical assistance in finalizing the proper order of the more than 4,000 names on the combined pilot seniority list. App. 607-11. The Technical Support Committee met on June 14 and 27 and July 11, 1991.

No one objected to the joint committee's sessions until July 12, 1991, when the People Express representatives distributed a letter withdrawing the PEX pilots from further participation in the Technical Support Committee. App. 796-97. Later that day, at Arbitrator Ross's request, Arbitrator Ross met with the PEX pilot chairman, Capt. Mackenzie, for 15-30 minutes.[3] App. 748. They met in the hotel lobby at first, and continued their conversation in the same meeting room in the hotel in which the Arbitrator had been meeting with the Technical Support Committee. *Id.*

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[3] Capt. Mackenzie, unlike the other Merger Committee Chairmen, did not serve on the Technical Support Committee.

Both Arbitrator Ross and Capt. Mackenzie have stated[4] that during their conversation they discussed only the letter in which the People Express representatives had withdrawn from the Technical Support Committee process. App. 748-49. The letter had just been distributed to the Arbitrator and the other parties during a meeting of the Technical Support Committee. Arbitrator Ross explained to Capt. Mackenzie that he found the Technical Support Committee sessions "invaluable." *Id.* Capt. Mackenzie reiterated what his colleagues had said in their letter. App. 748. Specifically, he told Arbitrator Ross that "the other parties had turned the Technical [Support] Committee sessions into an extension of the litigation process, rather than a forum for resolving purely

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[4] The Frontier Pilots sought no discovery in the district court regarding the July 12 events. Nor did they ever ask that the district court conduct an evidentiary hearing regarding these events. App. 846-47.

technical questions, and that it was unfair to the People Express pilots to continue them." *Id.*

Capt. Mackenzie's sworn Declaration made it clear (at paragraph 6) that the conversation was confined to the subject of the continued participation of the People Express representatives in the Technical Support Committee sessions:

> At no time during our meeting did I argue or suggest that the Arbitrator should merge the pilot seniority lists, or any segment of the lists, in any particular fashion. No agreements were offered or made. I told the Arbitrator I would discuss the subject further with my entire committee, which I did that afternoon and evening. App. 749.

For his part, in denying the FAL Pilots' August 12, 1991 request that he recuse himself, Arbitrator Ross placed this conspicuous, non-substantive conversation into perspective as follows:

> My discussion with Jim MacKenzie was limited to requesting that the People Express committee continue participation in the subcommittee meetings in the interest of promoting insight into the construction of the list, which in turn would lead to harmony among the pilot groups. At no time did we discuss the People Express captain ratio in relation

> to the Frontier pilots. Nor did he attempt to influence me with regard to the construction of any other part of the list. App. 750-51.

Arbitrator Ross also noted in his letter of August 13, 1991, in which he refused to recuse himself, that he had told the Technical Subcommittee representatives who were in the hotel lobby that he "intended to discuss the People Express Committee's continued participation" with Capt. Mackenzie, and that he assumed all of the parties knew about it prior to his meeting with Capt. Mackenzie. App. 750. The Frontier Pilots concede that they were aware of the contested conversation while it was occurring on July 12, and that no one sought to join it or to monitor what was being said. App. 753, 782.

On July 14, the Frontier representatives sent a letter formally objecting to the Technical Support Committee sessions on the same grounds as the People Express representatives. App. 808. However, in the last paragraph of the Frontier Pilots' letter to the Arbitrator, they expressly consented to continue

participating in the Technical Support Committee meetings by telling the Arbitrator, "[O]ur technical committee shall remain at your service for as long as you deem necessary." *Id.*

The Frontier Pilots' representatives did in fact participate in the three subsequent sessions of the joint Technical Support Committee, which were held on July 15 and August 7 and 8, 1991. Ross Decision, at 7 (App. 618). The Arbitrator met with counsel for all four parties on August 9 to discuss the language of the conditions and restrictions in the Award, and on August 13, the Arbitrator issued the Opinion and Award, together with a letter to counsel for the Frontier Pilots denying his motion of the previous day requesting the Arbitrator to recuse himself. App. 746, 750-51.

Arbitrator Ross's Opinion and Award summarized and analyzed the contentions of all four of the parties. App. 652-744. Rejecting the Frontier Pilots' contentions, Arbitrator Ross placed

approximately 295 PEX senior captains ahead of the block of 162 FAL senior captains which the Nicolau Award had created. App. 744.

V. THE DISTRICT COURT'S DECISION

The Letter Opinion of the District Court undermines the Frontier Pilots' contention that Arbitrator Ross and Capt. Mackenzie violated the District Court's specific prohibition against *ex parte* communications by their conversation on July 12, 1991. That ban is by its terms inapplicable for "any party electing not to be present for a meeting . . .,"[5] and the District Court found that "this conversation was in full

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[5] Section II.8.c. of the Order Compelling Arbitration provided:

> Neither Continental nor the committees may communicate with the neutral, either formally or informally, outside the presence of the other parties, except in writing, with copies to the other parties, provided, however, that any party electing not to be present for a meeting or hearing date waives any right to be present for such communications. Petition, at 13a.

and open view of the other parties' representatives." Petition, at 33a.

Furthermore, as the District Court also found, the Frontier Pilots offered "absolutely no evidence . . . that the conversation between Captain MacKenzie (*sic*) and Arbitrator Ross related to the substance of what transpired at the Technical Advice Committee meetings." Petition, at 32a. Thus, in the absence of any request by the Frontier Pilots for discovery or an evidentiary hearing regarding the July 12 events, the District Court accepted the explanations of Arbitrator Ross and Capt. Mackenzie as to the non-substantive content of their brief conversation. Petition, at 31a-32a and n.2.

Finally, in light of the extensive hearings Arbitrator Ross conducted, the District Court upheld the results of the arbitration as deriving from a process consistent with this Court's decisions in the *Steelworkers* trilogy and *United Paperworkers Int'l*

Union v. Misco, 484 U.S. 29, 36 (1987). Petition, at 23a-25a and 33a-34a. The District Court explained:

> [I]t is baseless for Frontier to suggest that the Arbitration Award should be overturned because of this half hour conversation . . . . The brief and limited discussion between Captain MacKenzie (sic) and Arbitrator Ross clearly did not prejudice the Frontier Pilots so as to deprive them of "a fundamentally fair hearing." See National Post Office Mailhandlers v. United States Postal Service, 751 F.2d 834, 841 (6th Cir. 1985). Petition, at 33a-34a.

Moreover, after thoroughly analyzing and distinguishing the line of cases now relied upon by the Frontier Pilots in arguing for a rearbitration of the Nicolau Award (Petition, at 48a-50a), the District Court explained in its Letter Opinion affirming the Ross Award (Petition, at 50a-52a):

> In my view, to the extent that Arbitrator Nicolau integrated the FAL pilots with the Continental pilots, the FAL and the Continental pilots became one body. Essentially, they had the same interests to protect. They each had a position on a pilot seniority list which they had attained as a result of the Nicolau Arbitration Award. I refused to allow the FAL pilots to argue for a change of their position on the seniority list vis-a-vis the Continental pilots in the

arbitration proceedings before Arbitrator Ross. If I permitted such conduct, then I would be encouraging a collateral attack on the award issued by Arbitrator Nicolau before the Colorado Supreme Court could issue a final determination on that award.

However, I permitted the FAL pilots to participate in the Ross arbitration in an effort to allow them to protect whatever position they had attained as a result of the Nicolau Award vis-a-vis the People Express pilots who were to be integrated by virtue of Arbitrator Ross' Award. Moreover, my order dated August 7, 1989, provided that any party may make application to this court, on short notice, to consider the impact, if any, of a reversal or modification of the Nicolau Award issued prior to the completion of the Ross arbitration proceedings. Since the Colorado Supreme Court has already affirmed the Nicolau Award, I refuse to change my position and collaterally overrule the Nicolau Award. Accordingly, I will not overturn the Ross Award on the basis of this argument. App. 919-20.

VI. THE DECISION OF THE COURT OF APPEALS

The Court of Appeals affirmed the decision of the District Court in a non-citable judgment order which does not disclose the reasoning of the Court of Appeals. Petition, at 59a-60a. Rehearing and

rehearing in banc were likewise denied without an explanatory opinion. Petition, at 62a-63a.

SUMMARY OF ARGUMENT

The Petition should be denied for two reasons. First, there is no conflict among the Circuits on either of the issues Petitioner seeks to raise. Second, this case does not present the issues that Petitioner describes. In particular, the role of a prior interest arbitration decision in a subsequent interest arbitration was not before the courts in the decisions on which Petitioner relies, and is not likely to recur. Moreover, on the rearbitration issue, the decisions of the courts below are in harmony with the decisions of other circuits which uniformly recognize that a grievance arbitrator has no power to overrule the prior decision of another grievance arbitrator on the identical factual matter determined. Both the Ninth and Third Circuits (which Petitioner contend conflict) applied the same rule by deferring to their respective district court's judgment involving whether, under all the circumstances

in the cases, a particular contact between an arbitrator and one party is grounds for overturning an award. In fact, the court below correctly upheld the decision of the district court, which correctly affirmed and enforced the thoughtful, thorough and well-reasoned decision of Arbitrator Jerome H. Ross merging the former People Express pilots into the combined Frontier-Continental pilot seniority list.

ARGUMENT

I. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE REARBITRATION ISSUE THE PETITION DESCRIBES AND THIS CASE DOES NOT IN ANY EVENT PRESENT THIS ISSUE

The Frontier Pilots' main argument in their Petition boils down to a complaint that the decisions of the Court of Appeals and the District Court prevented them from collaterally attacking a seniority arbitration decision rendered on June 15, 1987, in which Arbitrator George Nicolau irrevocably determined where the Frontier pilots should be merged into the Continental pilots' seniority list.

App. 171-222. *See* Petition, at 12. The Nicolau Award was made "final and binding" by the express terms of the Job Preservation Agreement which was signed by the lawful representatives of the Frontier pilots and unanimously ratified by the Frontier pilots themselves during a membership referendum in October 1986. App. 149, 325-6, 342, 438. Moreover, in a procedural agreement signed in January 1987, the FAL pilot representatives stipulated the finality of Arbitrator Nicolau's slotting of FAL pilots into CAL's seniority list. App. 303-05. Consequently, the Court of Appeals and the District Court properly held the FAL Pilots to their contractual arrangements and preserved the integrity of the Nicolau Award.

The Frontier Pilots misplace their reliance on several cases which they erroneously cite for the propositions that the doctrine of *res judicata* does not exist in arbitration, and that a subsequent arbitrator must always be free to undo a prior arbitrator's precise dispute resolution in a different case. An analysis of

these cases reveals that they do not support the sweeping conclusions the Frontier Pilots draw from them -- even with respect to the issue preclusion context in the grievance arbitration setting in which they arose -- and that they have no relevance whatsoever to two successive interest arbitration proceedings such as those before Arbitrators Nicolau and Ross.

A. The Frontier Pilots Blur the Difference Between Interest and Grievance Arbitrations

All of the cases the Frontier Pilots rely upon involve the preclusive effect of an earlier grievance arbitration decision when a similar or related issue arises under a collective bargaining contract's grievance-arbitration clause requiring the submission of all disputes concerning the interpretation or application of that contract to arbitration. None of these cases resembles the case at bar, in which the District Court barred the Frontier Pilots from collaterally attacking Arbitrator Nicolau's interest arbitration determination

in the subsequent interest arbitration before Arbitrator Ross.

The critical difference between interest and grievance arbitrations relates to the nature of the underlying disputes each resolves. The Railway Labor Act, 45 U.S.C. §§ 151, *et seq.*, which covers both the airline and railroad industries, classifies disputes as "major" and "minor." In Railway Labor Act terminology an arbitral resolution of a "major" disputes is called an "interest" arbitration; it forms a new agreement. A "grievance" arbitration resolves a "minor" dispute by interpreting or applying an existing agreement to a new situation. This Court classified these two categories of disputes in *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 65 S.Ct. 1282, 1290 (1945):

> The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

> The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. * * * In either case the claim is to rights accrued, not merely to have new ones created for the future.

Arbitrator Emanuel Stein aptly characterized the function of an interest arbitrator as legislating for the parties: "The task is more nearly legislative than judicial." *New York Shipping Ass'n.*, 36 LA 44, 45 (1960). As Arbitrator Whitley P. McCoy noted in *Twin City Rapid Transit Co.*, 7 LA 845, 848 (1947):

> Arbitration of contract terms differs radically from arbitration of grievances. The latter calls for a judicial determination of existing contract rights; the former calls for a determination, upon considerations of policy, fairness, and expediency, of what the contract rights ought to be.

In view of this critical distinction between interest and grievance arbitrations, it is irrelevant what

the rule is with regard to the referral to arbitration of a subsequent contract interpretation dispute in the face of an earlier resolution of a similar contract interpretation question (successive grievance awards). Such a rule might foster labor stability by enforcing the parties' agreement to submit to arbitration all disputes arising during the term of their collective bargaining agreement, but it is simply inapplicable to cases like the present one involving successive interest arbitrations.

In the instant case, one interest arbitrator, Arbitrator Nicolau, has already exercised his commission to determine on a final and binding basis what the Frontier pilots' seniority rights are with respect to those of the Continental pilots. But the Frontier Pilots wished to depart from that decision by changing those seniority rights in a subsequent interest arbitration convened before Arbitrator Ross to establish the People Express pilots' seniority rights with respect to the combined Frontier-Continental pilot group. The

Frontier Pilots have failed to identify any labor policy that would be advanced by permitting them to relitigate a final and binding interest arbitration (the FAL pilots' own integration into the CAL Pilots' seniority list) in a subsequent case convened to settle a different matter (the PEX Pilots' integration into the combined FAL/CAL seniority list). More significantly, for present purposes, Petitioner has failed to identify another case in which any court has authorized a subsequent interest arbitrator to overrule the decision of a prior interest arbitrator on the same question, and the instant case thus does not present the issue described in the Petition or any other substantial question likely to recur.

B. The Frontier Pilots Mischaracterize the Precedent They Rely Upon

The cases cited by the Frontier Pilots do not stand for the propositions for which they cite them. The starting point in any analysis of arbitrability is this Court's instruction that the question of arbitrability is for the courts to decide, not arbitrators.

> [T]he question of arbitrability--whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance--is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.

AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 647, 649, 106 S.Ct. 1415, 1418 (1986). Clearly, whether a dispute is appropriate for arbitration is to be determined by the courts. Yet, contrary to this explicit allocation of judicial and arbitral tasks, the Frontier Pilots argue that the Court of Appeals and the District Court erred by determining that the dispute over how to merge the Frontier and Continental pilot seniority lists was no longer arbitrable (because it had already been decided by Arbitrator Nicolau) instead of referring the arbitrability issue to Arbitrator Ross. Petition, at 44-45. The Frontier Pilots thus have it precisely backwards when they claim that the District Court abused its discretion by making

an arbitrability determination instead of delegating it to Arbitrator Ross.

The Frontier Pilots' confusion derives from their failure to recognize that, in contrast to the present case, all of the cases on which they rely deal with an arbitrator's authority to resolve a dispute between parties (an employer and a union) to a collective bargaining agreement with a broad grievance-arbitration clause covering all disputes concerning the agreement's meaning or application. Unlike the instant case, all of the cases the Frontier Pilots cite concern a subsequent arbitrator's resolution of an earlier interpretative dispute under the contract was arguably to be given preclusive effect to bar the arbitration of a similar or related issue involved in the subsequent dispute.

In some of cases the Frontier Pilots cite (Petition, at 24-26, 29-37), the courts ruled that a subsequent dispute between the employer and the union over the extent to which their collective bargaining contract bars relitigation can itself constitute

a dispute covered by the mandatory arbitration provision of their collective bargaining contract. *See, e.g., Local 103, Int'l Union of Electrical Workers v. RCA Corp.*, 516 F.2d 1336, 1340 (3d Cir. 1975): "Does a dispute as to the application of the re-arbitration provision constitute an arbitrable question under the contract? We hold that it does." But that is of no relevance here because (1) there is no contractual basis for a second arbitration of the same dispute that Arbitrator Nicolau decided in 1987; and (2) there is no collective bargaining contract with a broad (or even a narrow) mandatory arbitration provision.

Nor is it meaningful here that some of the Frontier Pilots' cited decisions hold that an arbitrator's interpretation of a clause in a collective bargaining contract may not legally bind a subsequent arbitrator in the same sense that one court's edicts regarding an issue carry binding effect on another under the doctrine of *stare decisis*. Neither Arbitrator Nicolau nor Arbitrator Ross was construing a collective bargaining

agreement in order to resolve an interpretative issue arising under the agreement's broad grievance-arbitration clause. Rather, Arbitrators Nicolau and Ross were each creating a new agreement for the parties. The Frontier Pilots thus misconstrue the entire line of authorities on which they rely in seeking to apply cases on grievance arbitration to the present case involving interest arbitrations.

C. The Decisions of the Courts of Appeals and the District Court Are In Harmony with the Decisions of Other Circuits on the Rearbitration Issue

Well-reasoned decisions of the First, Third, Fifth, Seventh, Eighth and District of Columbia Circuits contradict the Frontier Pilots' thesis that courts should always permit arbitrators to determine what effect, if any, to give to prior arbitration awards. The Frontier Pilots simply ignore most of these decisions.

For example, in *Chambers v. Local Union No. 639*, 579 F.2d 375 (D.C. Cir. 1978), the initial arbitrator granted seniority integration, but the union and employer wrongfully defeated the award in a

subsequent grievance proceeding. The court held that the initial seniority arbitration was final and binding and the union "improperly attempted to use the second grievance as a vehicle for overturning the earlier decision" and that "[it] had no right to do this." *Id.* at 383. The Court of Appeals explained: "To whatever extent the decision on the second grievance attempted to reopen the seniority question settled by the [first arbitration] decision, it was void and was not itself entitled to any final and binding effect . . . ." *Id.* Consequently, the court refused to enforce the second decision and ordered appellees to pay damages.

The Frontier Pilots also omit any mention of *Boston Shipping Ass'n v. International Longshoremen's Ass'n*, 659 F.2d 1, 2, 4-5 (1st Cir. 1981), in which the court gave binding effect to a grievance-arbitration award defining the geographic boundaries of Berth 13 at the Castle Island terminal facility for purposes of determining manning requirements under the parties' collective bargaining agreement. Holding that "[the

arbitrator's] award was inherently prospective as to the dimensions of Berth 13," the court rejected the union's contention that the commencement of a new contract term voided prior awards and ruled that the employer was "entitled to enforce the arbitration award in the new contract term." *Id.* at 4-5. Arbitrator Nicolau's decision was likewise "inherently prospective," and the District Court correctly barred the Frontier Pilots from relitigating before Arbitrator Ross the precise dispute that Arbitrator Nicolau had already determined.

In extending "controlling" effect to the prior arbitration award to bar rearbitration of the same issue, the First Circuit in *Boston Shipping Ass'n*, *supra*, 659 F.2d at 4, accepted the reasoning of the Fifth Circuit in *Oil, Chemical & Atomic Workers v. Ethyl Corp.*, 644 F.2d 1044, 1051 (5th Cir. 1981), in which that court devised a test of "material factual identity." The Frontier Pilots fail to refer to the Fifth Circuit's explanation of its rule for applying the doctrine of issue

preclusion to successive grievance-arbitration cases, 644 F.2d at 1051:

> If, based on the evidence at trial, it is not even arguable that the current facts fall outside the [collective bargaining contract's] prohibition or within an exemption of the article in question, then a court can safely conclude that the defendant's conduct does not differ materially from the previously condemned actions and thus, that the defendant is committing a "like" violation of the bargaining agreement, in violation of the prior arbitration award. (Emphasis in original).

The Fifth Circuit categorically asserted that submission of a dispute to arbitration would be erroneous whenever it was "beyond argument that there is no material difference between the current facts and the facts on which the prior arbitration award was based. . . ." *Id.* at 1055. It is beyond argument that the Frontier Pilots seek a second arbitration before Arbitrator Ross on the manner in which the seniority lists of the Frontier and Continental pilots should be merged even though there was "material factual identity" with the Nicolau Award's key facts, *i.e.*, the

names and seniority numbers of the Frontier and Continental pilots.

Similarly, in *International Ass'n of Machinists v. Republic Airlines*, Inc., 829 F.2d 658, 662 (8th Cir. 1987), the Eighth Circuit concluded that "the district court rather than the arbitrator should decide whether the Board's decision regarding the 1984 grievances 'previously settled' the threshold catering issue, thereby rendering the new grievances inarbitrable." Applying this rule to the present facts, it is again obvious that the District Court, rather than Arbitrator Ross, properly decided whether the merger of the Frontier and Continental pilot seniority lists was "previously settled" by Arbitrator Nicolau and the Colorado state courts upholding the Nicolau Award. *See also United Electrical Workers v. Honeywell*, Inc., 522 F.2d 1221, 1228 (7th Cir. 1975) (a "strict factual identity" between the facts in both disputes is required to apply *res judicata* in arbitral context); *Avco Corp. v. Local 787 UAW*, 459 F.2d 968 (3d Cir. 1972) (same);

International Chem. Workers Union v. Purex, Inc., 427 F. Supp. 338, 339 (D. Neb. 1977), *aff'd*, 566 F.2d 48 (8th Cir. 1977) (same); *Graphic Arts Int'l Union, Local 97-B v. Haddon Craftsmen, Inc.*, 489 F. Supp. 1088, 1096 (M.D. Pa. 1979) ("Of course, an arbitrator has no power to overrule a prior decision of another arbitrator. . . ."). *Cf. Fournelle v. N.L.R.B.*, 670 F.2d 331, 334 (D.C. Cir. 1982) ("it is simply inconsistent with the realities of labor arbitration to maintain that, without an express contractual term giving the results of past arbitrations precedential effect, the arbitrator's rulings are isolated utterances without a general application to the ongoing collective bargaining relationship.").

Nothing in any of this Court's decisions is to the contrary. None of this Court's decisions requires the judiciary to treat interest arbitration awards like the Nicolau Award and the Ross Award as "isolated utterances," subject to redetermination whenever another seniority merger arises. Indeed, all of the

cases the Frontier Pilots cite dealt with the preclusive effect of grievance-arbitration awards interpreting collective bargaining agreements.

Therefore, the Court of Appeals and the District Court correctly held that the Frontier Pilots were entitled to only one final and binding arbitration on the issue of their seniority placement with respect to the Continental pilots. The Frontier Pilots were properly barred from relitigating that exact question in the proceedings before Arbitrator Ross.[6]

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[6] Moreover, since the Judgment Order below lacks any "precedential or institutional value," it does not create a conflict with another court's decision. U.S. Ct. of App. 3rd Cir., Rules, App. I, IOP6.2.1. (Third Circuit Internal Operating Procedures). The Order was not published and cannot be cited by any future litigants; it applies only to the specific parties involved. *Id.*

II. THE ARBITRATOR'S BRIEF, CONSPICUOUS, NON-SUBSTANTIVE CONVERSATION WITH CAPT. MACKENZIE ON JULY 12, 1991 DOES NOT MERIT FURTHER REVIEW

A. There is No Conflict Among the Circuits With Respect to the Need to Treat Allegations of Ex Parte Communications Based on All of the Particular Circumstances Presented

The Third Circuit was entitled to defer to the District Court's finding that Arbitrator Ross conducted the lengthy and complex proceedings before him with fairness and impartiality on precisely the same rationale as the Ninth Circuit deferred to the lower court's determination of improprieties in *Pacific & Arctic Ry. Co. v. United Transp. Union*, 952 F.2d 1144 (9th Cir. 1991), a decision upon which the Frontier Pilots misplace their reliance (Petition, at 53-55). In *Pacific & Arctic*, the trial court found, unlike in the case at bar, that the supposedly "neutral" arbitrator had committed the functional equivalent of fraud on the railroad by socializing extensively with the union's partisan arbitrator during the recesses in their two-day hearing, by accepting gratuities from him, by refusing

to permit the railroad's attorney to put his case into evidence during the hearing, by proceeding with the hearing in the railroad's absence and by assisting the union to "shape" its case favorably during this one-sided hearing. *Id.* at 1146-47. In contrast, the Court of Appeals and the District Court in the present case found that no comparable misconduct or prejudice occurred here.

Indeed, Judge Politan expressly found that the Arbitrator's brief, conspicuous, non-substantive conversation with a People Express pilot did not deprive the Frontier pilots of a "fundamentally fair hearing" (App. 909-10), and the Third Circuit properly deferred to that finding. *Mutual Marine & Island Co. v. Norad Reinsurance Co.*, 868 F.2d 52, 57 (3d Cir. 1989) ("burden of proof rests squarely on the shoulders of appellants to show that prejudicial *ex parte* communications took place."). *Accord In re Federal Skywalk Cases*, 680 F.2d 1175, 1183-84 (8th Cir. 1982), *cert. denied*, 459 U.S. 988, 103 S. Ct. 342 (1982)

(Despite *ex parte* contacts initiated by federal district judge, full record was developed on the complex questions at issue and his challenged class certification ruling was upheld because it was "carefully reasoned" and "based solely on his judgment such action would best serve the interests of all parties involved."). *See also Braniff Master Executive Council v. C.A.B.*, 693 F.2d 200, 227 (D.C. Cir. 1983) (airline's *ex parte* communications with Chairman and staff of federal agency regarding Labor Protective Provisions did not constitute a basis for overturning agency's ruling because they "did not give the Board any otherwise unstated information about the carrier's position on LPP's.").

The decision in *Pacific & Arctic* presents no conflict with the case at bar because the facts here are so different and because the courts of appeals in both cases applied the same rule of deference to the trial court's findings. The Ninth Circuit simply found itself with "one of the very rare cases" in which a court is

required to vacate an arbitration award based on fraud. *Pacific & Arctic*, 952 F.2d at 1149. However, both Courts of Appeals deferred to findings made by the District Courts; the fact that one arbitration award was set aside and the other was upheld merely derives from the respective District Courts' sharply contrasting findings of fact.

B. The Third Circuit's Acceptance of the District Court's Determinations That No Substantive Communications Occurred and That No Prejudice Resulted from the Challenged Conversation Negate Petitioner's Second Issue

In asking this Court to order lower courts to respect strictly any prohibition on *ex parte* communications between parties and their arbitrator, Petitioner urges adoption of a minimalistic standard for finding misconduct, which would admittedly lead to judicial invalidation of more arbitration awards. Petition, at 48-56. The FAL Pilots purportedly derive that standard from the Ninth Circuit's decision in *Pacific & Arctic Ry. & Nav. Co. v. United Transportation Union*, 952 F.2d 1144 (9th Cir. 1991). Petitioner claims

that the Court of Appeals in that case used a standard that dispenses with the need to show prejudice to a party resulting from an improper contact and that dispenses as well with all evidence of what in fact was said to the arbitrator. Petition, at 54.

In the instant case Petitioner erroneously claims that the Third Circuit required it to produce "direct evidence . . . that merits of litigation were discussed." Petition, at 54-55. In fact, both the Ninth and the Third Circuit Courts of Appeals deferred to the findings of the District Courts concerning the substantive or non-substantive nature the disputed contacts.

Under Petitioner's theory of the case, a court should automatically infer that the merits of the case were discussed (under the purported rule in *Pacific & Arctic*) from the mere occurrence of a conversation between Arbitrator Ross and Capt. Mackenzie, and Petitioner would have no burden of showing prejudice. Therefore, claims Petitioner, the seventy-two day

arbitration award should be set aside simply because Arbitrator Ross and Capt. Mackenzie spoke to each other outside the hearing of the other parties. Whether they discussed only the time the next meeting was to begin, the weather, or the presidential campaign would be of no consequence. Nor would the boycotting of such a conversation by the other parties be relevant under Petitioner's theory. Instead, once Petitioner proved a conversation occurred, the conversation, no matter how trivial, would be enough to justify vacating any arbitration award. There would be no need for any discovery concerning the content of the conversation. That is certainly not the law and the question thus posed does not merit review by this Court.

Moreover, since the court below accepted the District Court's explicit finding that no prejudice resulted from Arbitrator Ross's brief conversation with a People Express pilot, whether or not findings on prejudice are required in general is not an issue in this

case. Here, the Court of Appeals properly deferred to the District Court's findings that the uncontradicted evidence in the trial court revealed no prejudice to the Petitioner.

C. There is No Conflict Among the Circuits Regarding the Duty of the Judiciary to Affirm Arbitration Awards in Which, As Here, All Parties Received a "Fundamentally Fair Hearing"

Whatever might be said of the Ross-Mackenzie exchange, moreover, it is surely no basis for invalidating the results of a lengthy, complex and hard-fought arbitration. An arbitral error requiring judicial reversal "must be one that is not simply an error of law, but which so affects the rights of a party that it may be said that he was deprived of a fair hearing." *Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.*, 397 F.2d 594, 599 (3d Cir. 1968), *cert. denied*, 393 U.S. 945, 89 S.Ct. 378 (1968). As Associate Justice Stewart (Retired) explained in a case in which he sat by designation on the Sixth Circuit Court of Appeals, *National Post Office Mailhandlers v.*

United States Postal Service, 751 F.2d 834, 841 (1985), and in which the District Court and the Court of Appeals upheld the award of an arbitrator accused of "dozing off" repeatedly during the hearing:

> Arbitrators are not bound by formal rules of procedure and evidence, and the standard for judicial review of arbitration procedures is merely whether a party to arbitration has been denied a fundamentally fair hearing. See Grahams Service, Inc. v. Teamsters Local 975, 700 F.2d 420, 422 (8th Cir. 1982) (citing cases).

Furthermore, arbitrators are not held to the same procedural standards as judges. Justice White's Concurring Opinion in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S.Ct. 848 (1969), recognized this principle, and it has gained widespread acceptance among federal trial and appellate courts. As District Judge DuBois explained in *Yorkaire, Inc. v. Local Union No. 19, Sheet Metal Workers*, 758 F. Supp. 248, 256 (E.D.Pa. 1990), *aff'd*, 931 F.2d 53 (3d Cir. 1991):

> Justice White reasoned that arbitrators should not [be] held to the standards of judicial decorum of Article III judges

> because '[i]t is often that because they [arbitrators] are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function.' *Id.* at 150, 89 S.Ct. at 340 (White, J. concurring).

Here, Arbitrator Ross's extensive experience as a labor mediator may well have enhanced his acceptability to the parties in this case and his discussion with Capt. Mackenzie on July 12 concerning the continuation of the Technical Support Committee sessions is understandable and non-prejudicial in view of this background. Arbitrator Ross's style, albeit not that of an Article III judge, was fully consistent with the post-hearing Technical Support Committee phase of the arbitration in which the parties were then voluntarily engaged. Especially in view of the extensive hearing time and oral closing arguments made available to all parties and the lengthy briefs submitted to the Arbitrator, the Arbitrator's brief, conspicuous, non-substantive conversation with Capt. Mackenzie cannot be said to have so prejudiced the Frontier Pilots as to

have "denied a fundamentally fair hearing" to them. App. 910.[7]

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[7] Two decisions the Frontier Pilots cite concerning *ex parte* communications are totally inapposite. *Totem Marine Tug & Barge v. North Am. Towing*, 607 F.2d 649 (5th Cir. 1979), involved Totem's termination of a time charter agreement with another carrier, North American, which had requested only return expenses, but received damages from the arbitration panel as well. Each of the arbitrators had a different figure for calculating damages, and the arbitrator appointed by North American telephoned North American's counsel, who provided a figure which did not match any of the figures of the members of the arbitration panel. Totem was never notified of this call, nor given a chance to respond to the figure, which the panel used to calculate the amount of damages. The court vacated the award, holding that receipt of this crucial evidence by the arbitrator, along with the expansion of the award beyond the amount requested by North American, constituted arbitral misbehavior prejudicial to Totem's rights. *Id.* at 653.

The substantive nature of the conversation in *Totem* clearly renders this decision inapplicable here, where no discussion of the merits of the case occurred. The secret nature of the *Totem* contact also makes it entirely unhelpful in the present case, in which the Arbitrator told the other parties that he would be talking to Capt. Mackenzie about the letter his colleagues on the Technical Support Committee had just distributed, and they all observed the conversation taking place.

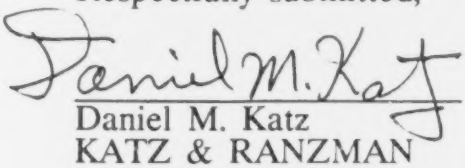
Similarly inapt is *United States Lines v. Federal Maritime Comm'n*, 584 F.2d 519 (D.C. Cir. 1978), in which two carriers petitioned the Federal Maritime Commission (FMC) to amend a joint service agreement to add a third party. Notice of the petition was published in the Federal Register, as required by the Shipping Act, and U.S. Lines filed comments. The FMC initially denied the petition to add the third party to the joint service agreement; however, without notice to U.S. Lines or the public, it later reversed itself and allowed the addition. During the period between the two rulings, the FMC received notices from the French and German governments supporting the addition of the third party, but these notices were never made available to U.S. Lines or the public. The court determined that, contrary to the statutory "hearing" requirement, these *ex parte* communications with the FMC were employed to introduce new arguments and positions and to respond to and rebut the arguments made by U.S. Lines in its public filings. *Id.* at 538, 539. The court therefore refused to uphold the FMC's decision to allow the addition of the third party. *Id.* at 541.

The same distinguishing factors evident in the *Totem* case thus also appear in the *U.S. Lines* case. The communications in question related to the merits of the pending case, unlike those between the Arbitrator and Capt. Mackenzie, and the losing party had no way of knowing at the time that any communications had occurred. Moreover, *U.S. Lines* did not even involve an arbitration, but the deliberations of an agency of the federal government.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should deny the Petition.

Respectfully submitted,



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Thus, neither of the two cited cases supports the Frontier Pilots' position here or creates a conflict among the circuits.